Gibson *v.* Union Rolling Mill Co., 3 Watts., 32.

Thus it comes back to the vague expression, the intention of the parties as inferred from their acts, their situation, and all the circumstances of the case. From some circumstances it may be inferred that the parties meant to take the risk of the thing which has turned out contrary to their expectations, as in the case of the coal mine which had coal but not coal workable at a profit: Walker *v.* Tucker, *supra*. The total absence of coal or iron ore would not be a risk contemplated in such a lease, however, Muhlenberg *v.* Henning, Fritzler *v.* Robinson, *supra*, and would be ground for rescission. Perhaps it is safe to say that where the fact or thing in question is such that it only affects the value of the bargain gotten by the contract, but does not strike at, or totally destroy the main consideration, it will not afford ground for rescission.

For, while it must not be supposed that in buying or selling the parties intend to make any special value in the thing bought or sold an essential of their contract, yet it is reasonable to suppose that they did contemplate, as essential, the existence of the thing itself substantially, that is, in selling a patent they meant a valid patent, in selling a right to mine coal they meant a right to coal, not to a mere hole in the ground, although they must be supposed to take the risk of its being workable at a profit. In a contract for personal service, they must have contemplated the risk of death or of inability to perform.

T. B. STORK.

DEPARTMENT OF TORTS.

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NORTHERN PACIFIC R. R. CO. *v.* PETERSEN. EIGHTH CIRCUIT COURT OF APPEALS.[1]

Fellow Servants.

The foreman of an extra gang of track repairers who had the entire charge, including the sole supervision of the work and the employment of servants, is a vice-principal for whose negligence the railroad company is liable to a workman injured while under his orders. Though under the law of Wisconsin, where the accident happened, the company would not be liable, since no State statute is to be construed, the Federal authorities will be followed and the workman may recover from the company, Ross *v.* C. M. & S. P. R. R., 112 U. S., 377, followed.

[1] 51 Fed. Rep., 182. June 20, 1892.

THE MASTER'S LIABILITY TO A SERVANT FOR THE TORTS OF ANOTHER SERVANT.

This case furnishes an excellent example of the different views entertained by the various Courts in the United States upon the subject of the master's liability to the servant for injuries caused by the negligence of another servant of the same master engaged in the same employment. Had the action been brought in the State Court of Wisconsin, the servant could not have recovered, the master only being liable to one servant for another's acts while that other is engaged in performing some duty which the master himself owes to the servant, irrespective of the relative ranks of the servants. On the other hand, in the Federal Courts the right to recover depends upon the question whether the servant causing the injury has been given authority and control over the one injured.

The rule that a master is exempt from liability to a servant for injuries sustained by him through the default of a fellow servant is by no means ancient. The first trace of it is found in the case of Priestly *v.* Fowler, 3 M. & W., 1, decided in the Exchequer in 1837, yet in the fifty years that have passed since then the rule has been applied in almost innumerable cases. The principle has never been questioned, but it is as to the extent of its application that such widely different views have been entertained.

The two earliest cases, Priestly *v.* Fowler and Murray *v.* South Carolina R. R., 1 McMullan (S.C.), 375, went partly upon the ground that the master is under no obligation, either under the contract of employment or in consequence of the relation in which he stands to the servant, to answer, in the absence of knowledge of any defect or incompetency, for the absolute safety of the appliances supplied or the skill and carefulness of his other servants, and partly upon the ground, so clearly stated by C. J. SHAW and Mr. Baron ALDERSON in the two cases next decided, that the consequence of a fellow servant's negligence was one of the risks assumed by the servant when entering into the master's service. In the first case Lord ABINGER held that the servant could not hold the master responsible for an injury received by him owing to the breaking down of one of the master's vans on which he was riding, the breakdown being caused by overloading; and in the second a railroad company was held not liable to one of its firemen for an injury caused by the carelessness of an engineer.

It was said that the danger was quite as well within the servant's observation as the master's, and the servant was not bound to risk his life in the master's employment, but might decline any service in which he had reason to apprehend injury to himself. In Farwell *v.* Boston & Worcester R. R., 4 Metc., 49, Chief Justice SHAW, of Massachusetts, laid down the basis of the doctrine as follows: The servant does not stand to the master in the position of a stranger, therefore the maxim *respondeat superior* does not apply between them. Their rights and liability are governed by the contract of service. In the contract there was neither expressed nor implied any obligation upon the master's part to answer for the skill and

care of all the other servants. "On the contrary," he says, "he who enters into the employment of another for the performance of certain duties and services, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. Nor should the perils arising from the carelessness of those in same employment be excepted. They are perils which the servant is as likely to know as the master; they are as incident to the service and as distinctly provided for in the rate of compensation as any other risk. Nor was the near association of the servants the test. The rights of the parties did not depend upon the servant's ability to observe and avoid the negligence of the fellow servant, but upon the absence of any duty on the master's part, arising from the contract or otherwise, to answer for the skill and care of his other employees." In Hutchinson *v.* York, Newcastle & Berwick R. R., 5 Exch., 343 (1850), Mr. Baron ALDERSON arrived at precisely the same conclusion, where a servant of the railroad, in the discharge of his duty, was riding upon a train belonging to the railway and was killed by an accident occurring through the negligence of the engineer of another train, also belonging to the defendant company. The plea of the defendant company set out that the servants in charge of the second train were competent and fit persons to have control of a train, and that the accident was entirely due to their negligence, without any negligence on the part of the company. The plea was held good. The servant "knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servants, and he must be supposed to have contracted on the terms that as between himself and his master he would run this risk." It was objected that the master was not exempt from liability unless the injury resulted from acts of servants engaged in a common act of service at the time. This objection was not sustained, and the principle was stated to be "that a servant when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant whenever he is acting in discharge of his duty as servant of him who is the common master of both." But "the master shall take due care not to expose his servant to unreasonable risks." Where, too, the servant is not at the time of injury acting in the service of his master, he is substantially a stranger, and the master is not exempt from responsibility to him for the negligence of another servant causing that injury. And this reasoning has been accepted as the true basis of the rule in practically every court in which this question has arisen. The sole difference of opinion has been as to the extent of the risks assumed by the servant of the duty of the master to use reasonable care to protect the servant from risks not necessarily incident to the employment.

It has been urged that while this reasoning assumes that the servant has knowingly and willingly accepted the risks and to have been

paid therefor in the calculation of wages, in reality the pressure of poverty and necessity makes it farcical to consider that he has voluntarily done so, no option being left to him but to take the place or starve, and that wages are never governed by the risks of the business, but by the law of supply and demand; even granting this to be true, although there is much reason to hold the statement to be far too broad, the hard position of the servant, while it may arouse sympathy for him, cannot alter the fact that he has with his eyes open to risks of the employment and, voluntarily, as between the master and himself, no matter how great the compulsion of outside circumstances, entered into a contract of service at a rate of wages which is agreed upon as between them as a sufficient compensation for the services rendered and the risks assumed. The workman may not be in a position to demand what would in reality compensate him for the risks he runs, but no more may he be able to contract for all that his labor is really worth; could he then set aside the contract he had made and recover as near as may be the true value of his services, because the law of supply and demand and inability to secure any other employment had forced him to agree to accept wages which did not adequately represent the value of his labor?

The servant then assumes all the ordinary risks necessarily incident to his employment—all such as one entering into any employment does or should, by the exercise of reasonable care, foresee that he will be exposed to in the ordinary course of such employment. He should foresee that he will be associated with other persons employed by the same master to effect the same general end, and that his safety will depend upon the care and skill with which those so associated with him perform their duties. If the business is a large one, divided into numerous departments, he should foresee that while he may be far separated physically from those employed in another department, their carelessness may not the less affect him, and cause peril to him which he may not be able to avoid. He should foresee that he must of necessity be under the control and authority of other servants of the same master, and to the careful and skillful manner in which they exercise their authority must he look for safety.

The master's exemption from liability only exists while both servants are engaged in his service. When the servant has ceased work for the day, and is no longer engaged in the master's service, he stands to the master in the relation of a stranger, and for an injury occurring to him through the default of any other servant the master is responsible as to any stranger. So where a carter had carelessly left upon the sidewalk of his master's factory a pile of ashes, a servant of the same master, who, having left the factory on his way home from work, fell over the ash heap and was injured, was held entitled to recover against his master, the relation of fellow servant ceasing with the end of the day's work. Baird *v.* Pettit, 70 Pa., 477.

I. The servant does not by entering into the master's service absolve him from all liability for any injury suffered by him while in his employ. He only assumes those risks which are naturally and

ordinarily, it might be said necessarily, incident to the employment in which he engages—not which, in addition thereto, are created by the master's own careless or willful disregard of the servant's safety. He agrees to run only those risks of necessity involved in the employment conducted with due care and regard for the servant's safety. The master may not expose the servant by his own carelessness to risks not inherent in the very nature of the service, and then claim exemption from liability for any injury resulting therefrom on the ground that the risk was one accepted by the servant himself.

The law imposes upon the master, in consequence of the relation in which he stands to the servant, the duty to use all reasonable care that the employment shall be as little dangerous to his servants as its nature will allow. Certain duties are conceded by all Courts, however they may vary as to the extent of the master's liability, to be owing by the master to the servant.

The master must use reasonable care and skill (1) to provide the servant sufficient and safe machinery and appliances with which to work, (2) to provide a safe and proper place wherein to work, (3) to employ and retain in his employment servants competent and skillful to the best of his knowledge, sufficient in number to carry on the business with safety, (4) to establish a reasonably safe system of rules and regulations for the conduct of the business, (5) to see that no one servant is placed in a hazardous employment, the risks of which he does not know and is not bound to know, without due warning of its dangerous character.

These are duties imposed upon the master himself, duties absolute and imperative, from which he can free himself by nothing short of performance. His duty is not to provide a reasonably safe system for the selection of fit machinery, for instance, such a system as, if followed, will procure proper appliances; his duty is to see himself that none but safe and proper machinery is provided, and in default of this to be responsible for the consequences; not to entrust the selection of servants to a subordinate, but to see that no man who by reasonable care would be discovered to be incompetent or careless is employed, and if he fail to do so it is no excuse to plead that the subordinate to whom the selection of servants was given was the most skillful and scrupulously exact person in existence, and had never been in fault before. See. however, Merry *v.* Wilson, 1 H. L. Sc. Ap. Cases, 326. It is a duty personal to the master, who cannot delegate it to another, or, if he does, and that other fail, he must still be liable, not because the other was known to him to be unfit, but because he has not fulfilled his legal obligations. Some difficulty has arisen owing to the frequency of the cases in which the master is a corporation, incapable of acting save through agents.

It is asked, shall a corporation, therefore, never be liable to a servant for injuries sustained in its employ? The answer is simple: Its duties as master are neither greater nor less than those of an individual. It owes the same duties to its servants, and since it can only act through agents, it must be answerable for any default by the agent in the doing of that which it

is the master's duty to do, just as any natural person is responsible for the default of his subordinate in the performance of the duty which he himself is under to his servants. In the one case the corporation has no choice but to act through an agent, in the other the master could act for himself, but chooses to act through a subordinate; in both the master is liable to the servant for any default.

In England and many States of the United States this has come to be the test: Was the servant who caused the injury engaged in doing that which it was the master's duty to do, or something which was solely a servant's duty? In the first case the master is liable, in the second he is not.

It has by some been thought that even where the master's liability is most restricted, if he entrusts the management of the entire business, or a distinct part thereof to another, he is liable for all his acts. This will be found to be based on cases deciding that where a master, be he a natural being or corporation, entrusts to a servant full control over the performance of any of these duties, he is liable to any other servant injured by their non-performance. This is not adding on to these duties any further one; it is merely a statement applicable to particular facts of the general rule that a master may not free himself from his liabilities for the performance of his personal duties by delegating the performance of them to another: Mullan *v.* S. S. Co., 78 Pa., 25, providing fit machinery and tools; Brinkner *v.* Lane, 2 Lansing (N. Y.), 506; App., 49 N. Y., 672, choosing servants.

The test, then, is whether the servant, whose negligence caused the injury, was at the time engaged in performing a duty which the law imposed upon the master (those duties being included under the five heads above given), or was merely doing that which it is the duty of a servant to do. The test is briefly the character of the act done, and not the relative position of the parties causing and sustaining the injury. "It is immaterial whether he who causes the and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal or greater authority. If they are acting together under one master in carrying out a common object they are fellow-servants," GRAY, J. Gilman *v.* Eastern R. R., 10 Allen (Mass.), 233. As said by POLLOCK, C. B., in Morgan *v.* Vale of Health R. R., Ex. Ch. L. R., 1 Q. B., 149, "we must not over refine, but look at the common object, not the common immediate object." All persons engaged under the same master in the furtherance of the same business, no matter how different the immediate object of their work may be, how dissimilar the details of their employment, are fellow-servants. So a carpenter at work on the roof of an engine shed was held in the latter case to be a fellow-servant of parties moving an engine on a turn-table below.

In New York this test has been strictly adhered to. The question always considered is whether the negligence was in the performance of any of the above enumerated duties, which the master owes to the servant.

In Crispin *v.* Babbitt, 81 N. Y., 518, it was held that even where the sole control of the entire business

was given to a superintendent, the master was not liable to the servant for the doing by the superintendent of something which it was not the master's duty but the servant's to do. In this case the superintendent, in assisting to run the machinery in the factory, injured a servant, and the master was held not responsible. So it is submitted that if the master himself had so engaged in the business he would not be liable as master to the servant for his own negligence, but as the very person by whose default the accident occurred, just as of course one servant could recover against another whose negligence had injured him, nor could one member of a firm make the firm liable as master for his carelessness in doing of such an act. In Pennsylvania the same test is laid down in innumerable cases, prominent among which are Lewis *v.* Seifert, 116 Pa., 628, and Wilson *v.* Ross, 139 Pa.

This test, whether the servant whose default caused the accident was engaged in performing one of these duties (see above), which the master is bound to see performed, is adopted in the following States: Massachusetts, Holden *v.* R. R., 129 Mass., 268; New York, Crispin *v.* Babbitt, 81 N. Y., 518; Pennsylvania, Lewis *v.* Seifert, 116 Pa., 628; Michigan, Quincy Mining Co. *v.* Kitts, 42 Mich., 34, deciding that the master cannot delegate selection of servants to a subordinate, and so escape liability; Missouri, Brothers *v.* Carter, 52 Mo., 373, but departed from later; Texas, Robinson *v.* Houston & Texas Central R. Co., 46 Tex., 550; Indiana, Kreuger *v.* R. R., 111 Ind., 51; Vermont, Davis *v.* V. C. R. R. Co., 55 Vt., 84; Virginia, with later tendency to follow Ross' case. See West Virginia, Criswell *v.* Pittsb. R. R., 33 Am. and Eng. R. R. Co.; Wisconsin, Brabbitts *v.* C. & N. W. R. R., 38 Wis., 289.

So in Maryland, Alabama, Rhode Island and Kansas, probably the only cases where the master is held liable to one servant for another's default is where one of the above duties is delegated to the servant who is negligent.

In South Carolina the test is said to be the same as in New York, but the courts extend the master's duties so as to include the superintendence of every portion of the business.

II. There have been two distinct departures from this view of a master's exemption from liability, both tending to limit and restrict to much narrower boundaries his exemption. The first and by far the most important widely adopted limitation being that where a servant is placed in a position of authority and control over his fellow servants, who are bound to obey his orders, that servant so far represents the master as to render him responsible for any default in the exercise of his authority by reason of which any of those servants under him are injured. This doctrine originated in Ohio, in 1851, in R. R. *v.* Stevens, 20 Ohio, 216, and was based upon a Scotch case, Dixon *v.* Rankin, 14 Ct. Sessions, Sc. Cases, 420, overruled in the House of Lords in Coal Co. *v.* Reid, 3 Macq., 266. It spread throughout the West and South, and has found acceptance in a court of so high authority as the Supreme Court of the United States, but never gained any foothold in the courts of New England or of the Middle States.

It goes upon the reasoning that

while, so long as two servants of the same master occupy positions of equal grade and neither is under the control of the other, neither is entitled to treat the other as agent or representative of the common master, yet where one is under the authority of the other, and bound to obey his orders, he is entitled to regard that other as representing the master.

When this theory was advanced in the earliest American cases it was immediately rejected, both in Massachusetts, by Chief Justice SHAW, and in Murray *v.* R. R. in South Carolina. Nor did it ever find any favor in England. In Murray *v.* R. R. it was held that the engineer no more represented the railway than did the fireman: "The movement of a train to its destination is the result of the ordinary performance by each of their several duties. On the part of the several agents it is a joint undertaking where each stipulates for the performance of his several part; they are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of the other."

By this view the servant is held to take upon himself the risk of negligence on the part of only those fellow servants who are equal or inferior in grade to himself. Surely, as Mr. Justice MOORE says in Robinson *v.* R. R., 46 Texas, 550: "The negligence of one grade is as much one of the risks of the business as the negligence of one of another grade, and it seems impossible to hold that the servant contracts to run the risk of the negligent acts and omissions of one class of servants and not of those of another class." He must, or should, foresee that he will be associated with servants some in authority over him, some not, from whose negligence he may apprehend danger. If this be not an ordinary risk which the servant must be assumed to have foreseen and accepted, it must be because it is the master's duty to his servant not only to provide careful and skillful persons to take charge of every branch of the work, but even to personally superintend every portion of the work done, to personally exercise every particle of authority in the business, to himself issue every order and stand responsible for every consequence of the careful and skillful carrying out of such orders. All that the servant risks is that the orders may be carelessly or unskillfully carried out.

And this is the view which the courts of South Carolina, departing from the earlier cases, has held in Couch *v.* C. C. & A. R. R., 22 S. C., 557. While the master is only liable to the servant for the default of a fellow servant while performing a duty belonging to the master personally, the proper exercise of the authority entrusted to a section boss of the members of his squad is such a duty. So that the master becomes responsible for the proper exercise of any authority, however slight, conferred upon any subordinate, however low in grade; he is responsible for the issuing of every order by any servant who has power to give orders; he is in fact required personally to manage and supervise every detail of his business, however vast it may be and however trivial that detail; he must personally issue every order and be answerable for the result of a careful obedience to it, and if he

delegate this duty he cannot discharge himself from liability. The duty is absolute and personal; for a failure in its performance he is answerable, no matter how competent and exact is the servant to whom he entrusts it. It requires the master to be omnipresent and all but omnipotent, surely a somewhat burdensome obligation to impose upon a master who is at best only a human being, often a corporation, which is not even that, and never an almighty deity.

It is only where the superior servant is exercising an authority conferred on him that the master is liable for his default; he is not the master's representative while engaged in working with the subordinates in the performance of his own commands. It is the improper exercise of an authority which the master is held bound to see properly exercised that makes him liable, not the superior grade of the servant alone. In many cases usually cited as establishing the master's liability for the acts of a servant placed in control of others, it will be found that the servant has been entrusted with the performance of some one of those duties already stated to be conceded to belong exclusively to the master: R. R. *v.* Little, 19 Kan., 267. Where the master was held liable to servant injured by defect in derrick, for negligence of fellow servant to whom he had entrusted entire authority over his machinery and its inspection: Same facts in R. R. *v.* State, 44 Md., 283; same facts in Wilson *v.* Co., 50 Conn., 433; Mining Co. *v.* Kitts (Mich). Where master entrusted to servant the duty of employing servants: Walter *v.* Bolling, 22 Ala., 294; R. R. *v.* Rerejoy, 86 Kan., 424. Where servant was ordered by his superior into position of unusual danger without due warning, also Mann *v.* Print. Works, 11 R. I., 152, where same state of facts existed. The Ohio rule is accepted in Kentucky (L. & N. R. R. *v.* Collins, 2 Duv, 114). Laborer assisting engineer to right a locomotive injured by engineer's negligence); Illinois (R. R. *v.* May, 108 Ill., 288. Foreman and laborer under him); Tennessee (East Tenn. R. R. *v.* Collins, 85 Tenn. 227; Section boss and section hand); Missouri (Nooce *v.* Wabach, 85 Mo., 588, but see Brother *v.* Carter, 52 Mo., 373); Nebraska (R. R. *v.* Landstrum. Conductor of construction train and laborer); South (Couch *v.* C. C. & A. R. R., 22 S. C., 557. Section master and hand, but see Gunter *v.* Graniteville Co., 18 S. C., 262); and North Carolina (Patton *v.* R. R., 96 N. C., 455. Section master and laborer); Virginia, and most important of all, the Supreme Court of the United States (C., St. P. & N. R. R *v.* Ross, 112 U. S., 377); and to a limited extent in Iowa (Brann *v.* R. R., 53 Iowa, 663; Baldwin *v.* R. R., 63 Iowa, 210; in 1860 in Wisconsin, but overruled the next year (Mosely *v.* Chamberlain, 18 Wis., 700, see also Howland *v.* R. R., 54 Wis., 226; Brabbits *v.* R. R., Wis., 289),

In the C., M. & St. Paul R. R. *v.* Ross, 112 U. S., 377, the Supreme Court of the United States, following the Ohio rule, decided that where a conductor by negligent failure to communicate his running orders to the engineer had caused a collision in which the engineer was injured, the railroad company was liable, Mr. Justice FIELD saying: "There is, in our judgment, a clear distinction to be made in

their relation to the common master between servants of a corporation exercising no supervision over others engaged in the same employment and those agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. A conductor having entire control of a railway train occupies a very different position from a brakeman, the porters and other subordinate employees. He is, in fact, and is to be regarded as, the general representative of the corporation, for whose negligence it is responsible to subordinate servants." The Court considered that all the authority of the corporation necessary for the running of the train was confided to the conductor, and he, for that purpose, represented the company. The great flaw in this reasoning is that the conductor has not exclusive control over the running of his train, trains being usually run under orders from higher sources. He is like the engineer, only engaged in the execution of those orders. THAYER, J., in the principal case, R. R. *v.* Petersen, thus interprets R. R. *v.* Ross: "The test applicable to the determination of the question of fellow service is not whether the servant has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction and control over a work undertaken by the master, and over employees engaged in such work whose duty it is to obey, and whether he has been vested by the master with such power of supervision and management."

II. In certain States of the United States a still further limitation of the master's exemption from liability has been adopted. However, it has never reached the popularity enjoyed by the "superior servant limitation." It is only accepted in Illinois, Georgia, Kentucky, Tennessee, Virginia, West Virginia and Arizona. Indiana, which at first adopted it, soon repudiated it, and it has been expressly rejected by the court, which has given to the superior servant theory such importance, the Supreme Court of the United States in Quebec S. S. *v.* Merchant, 133 U. S., 375. The limitation is that the master is only exempt from liability where both servants are so closely associated that the one injured might be able to observe and protect himself from the other's negligence better than the master could. The explanation given by Mr. Justice DICKEY, in R. R. *v.* Miranda, 93 Ill., 302, is this: The master's liability to a stranger depends on public policy—the master is thus impelled to greater care in selection of his servant, and the servant is rendered more careful by his devotion to his master's interest (?) Where, however, the reason ceases, the liability ceases. A servant working in close association with another, has power of rendering fellow-servants careful—by precept and example, and as a last painful resource to report their shortcoming to the master that he may discharge the careless servant—greater than the master can have, therefore the master should not be liable when injury results from carelessness or incompetence of such servant; but where there is no such association existing, the servant is in no better position than a stranger. He, too, must trust to the master's care in selecting his servants and the servant's regard for

the master's interests, and to him as to a stranger the master should be liable for the servant's shortcomings. In Farwell's case, C. J. SHAW expressly repudiates any such basis for a master's exemption. He says that the reason is not because the servant is better able to take care of himself than the master is to care for him, but because there is no obligation on the master's part either under the contract or in tort as to a stranger, to be responsible for the default of a fellow servant. "Hence the separation of the employment into different departments cannot create that liability when it does not arise from an express or implied contract or from a responsibility created by law to third persons and strangers for the negligence of a servant." This limitation has been expressly repudiated in the U. S. Supreme Court: Merchant *v.* Quebec S. S. Co., 133 U. S., 375. Where a stewardess belonging to steward's department was injured by negligence of fellow servants belonging to deck department, it was held the master was not liable. The other servants had no control over her, and the division of departments was for convenience in administration of the vessel, and did not make the other servants any the less fellow servants with stewardess. It is expressly rejected also in New York: Wright *v.* R. R., 25 N. Y., 562. Pennsylvania: Bud & Co. *v.* Newberry, 96 Pa., 246; R. R. *v.* Bell, 112 Pa., 400. Massachusetts: Holden *v.* R. R., 129, 268. Rhode Island: Brodeur *v.* Co., 17 Atl. Rep., 55. Texas: R. R. *v.* Harrington, 54 Tex., 59; North Carolina: 94 N. C., 625. Michigan: Quincy Mining Co. *v.* Kitts, 42 Mich., 34; Elevator Co. *v.* Neal. Maryland: 65 Md., 438. Minnesota: Foster *v.* R. R. 114 Minn., 360. Indiana: Gormley *v.* R. R., 72 Ind., 31.

It is accepted, as before said, in Illinois: Miranda *v.* R. R., 93 Ill., 302, and 108 Ill., 376. Section hand injured by fireman of passing train carelessly throwing out lump of coal. Kentucky: R. R. *v.* Collin, 2 Duv., 114. A laborer loading cars injured by negligence of engineer: Georgia: Cooper *v.* Milleirs, 30 Ga., 150. Engineer of one train injured by negligence of a servant of same railway in charge of another train. Tennessee: R. R. *v.* Jones, 9 Heisk., 27. Fireman killed by explosion of boiler owing to boiler makers' carelessness.

Virginia: Moon *v.* R. R., 78 Va., 745. West Virginia: Madden *v.* R. R., 28 W. Va., 610. But even in these States workmen, though under different foremen, if engaged in same line of employment and brought frequently into contact, are so far fellow servants that the master is not liable to one for injuries caused by another's default: O'Bryan *v.* R. R., 15 Ill. App., 134.

IV. In those States where the master's liability is made to depend not upon the relative rank of the servants, but upon the nature of the duty which the negligent servant is engaged in performing, the question which is of decisive importance in these cases is the nature and extent of duty owed by the master to his servants.

These duties, as has been seen, fall naturally under five heads:

(1) *The Duty to Provide Safe Machinery.*—The master must supply machinery containing no defect which reasonable skill and care might prevent. The master, however, is only responsible when the

machinery is supplied to the servant for use in his employment. So when railway engines are first inspected by boiler makers, then by machinists and then by mechanics who regulate the safety valves, and owing to negligent inspection by the boiler makers the boiler bursts while a mechanic is fitting a valve and injures him, the master is not liable: Murphy *v.* R. R., 88 N. Y., 146.

The business of constructing and inspecting engines was a branch of the railway business as well as the running of trains. The engine was not part of the machinery furnished the mechanic to work with, but the very thing upon which his work was to be performed. The boiler maker and mechanic were fellow servants engaged in the common employment of inspection: Murphy *v.* R. R., 88 N. Y., 146. Had the engine gone into the service of the railway company and while drawing a railway train burst and injured the engineer, whose duty it was to use the engine as an appliance of his employment, the company would have been liable.

Nor is a railway company which receives cars for transportation from another railway bound to test their safety, but may assume them to be safe in absence of proof to the contrary: Mackin *v.* R. R., 135 Mass., 201; Bullon *v.* R. R., 54 Wis., 269. In Wisconsin a distinction is drawn between machinery sent out from the master's shops complete and ready for use and machinery sent out in parts to be put together and erected at the scene of the work. In the latter case the master is not liable for the manner in which it is put together, if he has employed competent and ufficient servants to do the work and supplied them with proper materials: Peschell *v.* R. R., 62 Wis., 338. It is hard to perceive the force of this distinction, nor is it generally accepted.

In England, the rule is that the master is only required to furnish originally safe and suitable machinery and competent servants and appliances for keeping them in repair, but not personally to answer for their being always kept in good condition: Wilson *v.* Merry, L. R., 1, H. L. Sc. Ap. Ca., 326. This is followed in Massachusetts: Johnson *v.* Towboat Co., 135 Mass., 209; Maryland: Wonder *v.* R. R., 32 Md., 411; and New Jersey: McAndrews *v.* Burns, 39 N. J. L., 117. In the other States a master is bound not only to furnish proper appliances but to keep them in good repair.

(2) *Duty to Provide a Safe Place for the Servants to Work in.*—The master is under same obligation in regard to place of work as the tools and appliances for work. Where the workman must work upon a scaffolding the master is, as a rule, liable for accidents resulting from its improper construction by his servants, as well as those resulting from the use of improper materials. The most usual example is the duty imposed on a railway of providing and maintaining proper roadbed so that its servants may be in no peril therefrom: Snow *v.* R. R., 8 Allen (Mass.), 441. But in Mississippi the company is only bound to provide a proper roadbed and a competent and well equipped staff to repair it: Howd *v.* R. R., 50 Miss., 178. So in New Jersey: Harrison *v.* R. R., 31 N. J. L., 293, and Alabama: R. R. *v.* Smith, 59 Ala., 245.

But if the servant, knowing of a defect in machinery or place of

work, remains, he accepts the risks thereof as an extra risk in addition to the ordinary risks of the employment, and cannot hold his master responsible if injured in consequence of such defect: Anthony *v.* Luret, 105 N. Y., 59, Rummel *v.* Dilworth, 111 Pa., 343. In England, however, in Smith *v.* Baker, L. R., A. C., 1891, Lord HERSHELL says: "Where a risk to the employed," not a necessary incident of the business, "which may or may not result in injury, has been created or enhanced by the negligence of the employee, the mere continuance in service with knowledge of the risk will not preclude the employed, if injured by such negligence, from recovering in respect to his employer's breach of duty."

(3) *The Duty to Employ Proper Servants.*—The master on engaging a servant should make reasonable investigation of his skill, character and habits. He is responsible for any injuries caused by a failure to do so: Frazier *v.* R. R., 38 Pa., 104. If a servant has been engaged, but is unfit, the master is bound not to retain him in his employment *after* information of his incompetence is conveyed to him. He is not bound to take notice of every act of incompetence unless in some way brought to his notice, and unless a superior servant has the power to employ and discharge the incompetent servant notice to him is not notice to the master: Reiser *v.* P. R. R., 152 Pa., 38 Adv. Rep. The master must furnish a sufficient number of servants for the safe performance of every piece of work. Where a brakeman was injured in an accident caused by a train dispatcher sending out a train with an insufficient number of hands, it was held it was negligence in performance of a duty properly belonging to the company, for the consequence of which it was liable: Flike *v.* R. R., 53 N. Y., 549.

(4) *The Duty to make such General Rules as will Render the Employment Safe.*—The master is not liable for results of disobedience or improper fulfilment of such orders. Where a subordinate is given the power to make such rules, and issues an unreasonable special order from the obedience of which damage results, the master is liable. A railroad company is bound to make and publish safe and sufficient rules for the running of its trains; the making of such schedule or time table is the duty of the company, which it cannot delegate so as to escape responsibility: Besel *v.* R. R., 70 N. Y., 171; Vose *v.* R. R. Co., 2 H. & N. (Eng.), 720. Where a variation is made in the time of running a train it is the duty of the company to bring this variation, which is in effect a new schedule, to the notice of its servants: Lewis *v.* Seifert, 116 Pa., 628. The company is not bound to personally see that notices of the variation in the time table is brought home to the servants. The master discharges his duty when beforehand he provides and makes known to a servant rules explicit and efficient whereby notice will reach him if observed. He is not answerable for carelessness in the observance of the rules: Rose *v.* R. R., 88 N. Y., 217; Ford *v.* R. R., 110 Mass., 240. If a competent system for the transmission be provided, and notice is put in such orderly course of communication by him who has control of the making and publishing of rules, it is sufficient.

(5) *The Duty to Warn Inexperienced Servants of Unusual and Non-apparent Dangers Incident to the Particular Service.*—"If owners of dangerous machinery employ young persons about it quite inexperienced in its use, either without proper directions as to its use, or with improper directions and likely to lead to danger of which the young persons are unaware, as it is their duty to take unusual care to avert such danger, they are liable for any injuries which may ensue from the use of such machinery. The danger was apparent to one having experience, but not to one not having experience" (Lord COCKBURN): Grizzle *v.* Frost, 3 F. & F., 622. So if an adult have no experience and the master so knows, but a minor having experience takes the risk.

Test is—Were the circumstances such that the master should know that the servant neither knew, nor could with ordinary care become aware of the danger?

The servant only takes on himself those risks which with reasonable care he might know to be incident to his employment. The master is bound to disclose to the servant any non-apparent risks of the service. A servant was employed to run a circular saw, and had never seen one. It was held that if there was danger known to the master and not known to the servant, and which he could not have become aware by exercise of reasonable care, there was an absolute duty upon the master to give notice of it from which he could not escape by delegating it to a careful subordinate: Wheeler *v.* Wason Mfg Co., 135 Mass., 294; Keller *v.* Swenk, 151 Pa., 505.

V. In England and many of the States the subject is regulated by statute. In England, by the Employees' Liability Act of 1880, the master is liable to servant for injuries resulting from (§ 1) any defect in condition of machinery, ways or works or plant; (§ 2) any negligence in the exercise of power of superintendence delegated to a servant; (§ 3) the negligence of any servant, whose orders servant injured was bound to obey; (§ 4) obedience to rules laid down by master's authority; (§ 5) by negligence of any railway servant in charge of signal points, engines or trains. In Massachusetts the Act of 1881 follows the English Act closely, but with some important difference, among others the omission of §§ 3 and 4.

In Minnesota the law of 1887, Chap. 13, provides that railway in public use shall be liable to employé for co-employé's default. In Mississippi the Rev. Code, 1880, § 1054, alters but does not abrogate the common law. Rhode Island, by Rev. St., 1879, § 318, has placed railway employé in position of passenger, and requires the company to exercise toward him the same extreme care it owes passenger. Wisconsin passed in 1875 an act making railways liable to servants for fellow servants' negligence, but in 1880 repealed it, and returned to the common law. In Iowa, by Statute of 1887, provided that railway company shall be liable to employé for any wilful wrong of commission or omission on part of any agent or servant when such wrong occurred in connection with operation of such railway. Kansas in 1874 passed a more general act applicable to railways, but construed to extend only like Iowa act to those engaged in the hazardous business of railroad. By Georgia

act of 1855, incorporated into Code of 1873, it is provided that a railway company shall be liable to an employé as to a passenger for want of care in running their train. The fact of his being an employé shall not bar his recovery if he is himself without default.

NOTE.—For an exhaustive discussion of the whole subject see McKinney on "Fellow Servants," and for the cases in Pennsylvania, a pamphlet by Mr. A. Bolles, issued by Department of the Interior of Pennsylvania, in 1891, on "The Liability of Employers in Pennsylvania."

FRANCIS H. BOHLEN.

DEPARTMENT OF PROPERTY.

EHRET *v.* SCHUYLKILL RIVER EAST SIDE R. R. CO., APPELLANT,[1] SUPREME COURT OF PENNSYLVANIA.

Eminent Domain—Leaseholds—Damages.

Where, in a proceeding to recover damages for leasehold premises appropriated by a railroad company under the right of eminent domain, it appears that plaintiffs were under a contract to remove daily from the gas works of the City of Philadelphia, adjoining their leased premises on the River Schuylkill, a large quantity of tar, and that the premises in question, which they leased from the city, enabled them to receive the tar without cost and to manufacture it without transporting it to and from distant points, it is proper to admit evidence that, after the land was taken, it became necessary to carry the tar to a place of distillation by a boat specially constructed; that it was necessary to erect temporary works for the distillation of the tar when received; and that it was necessary to haul over inaccessible roads the barrels needed to hold the tar and its products.

THE MEASURE OF DAMAGES FOR THE APPROPRIATION OF LEASEHOLDS BY THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

There are two requisites to a valid exercise of the right of eminent domain: the property taken must be for a public purpose and compensation must be made. Constitutions of the various States con-

[1] Reported in 30 W. N. C., 564; 151 Pa., 158. Decided October 3, 1892.